

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

9 STEPHANIE M. GAMBINI,

10 Plaintiff,

11 vs.

12 TOTAL RENAL CARE, INC., d/b/a DaVita,
13 Inc., a California corporation,

14 Defendant.

NO. C03-5459 RBL

DEFENDANT'S MOTIONS IN LIMINE

NOTE ON CALENDAR:
November 26, 2004

15
16 **I. INTRODUCTION**

17 Defendant Total Renal Care, Inc., d/b/a DaVita, Inc. ("DaVita") moves in limine for the
18 exclusion of certain documentary evidence and testimony. DaVita requests that the court grant
19 these motions in limine to avoid drawing attention to the objectionable evidence at trial.

20 **II. ARGUMENT AND AUTHORITY**

21 **A. The court may determine, before trial, that evidence is inadmissible and
should be excluded.**

22 The trial court's pretrial determination regarding admissibility of evidence is given
23 great deference and its ruling should not be disturbed absent an abuse of discretion. *United*
24 *States v. Longoria*, 624 F.2d 66, 68-69 (9th Cir. 1980) (citing *United States v. Batts*, 573 F.2d
25 599, 606 (9th Cir.), *cert. denied*, 439 U.S. 859, 99 S. Ct. 178, 58 L. Ed. 2d 168 (1978); *United*

1 *States v. Riggins*, 539 F.2d 682, 683 (9th Cir. 1976), *cert. denied*, 429 U.S. 1045, 97 S. Ct. 749,
2 50 L. Ed. 2d 758 (1977)).

3
4 **B. Specific testimony that DaVita moves to exclude is provided as Exhibit 1 to the Declaration of Patricia K. Buchanan.**

5 There have been several depositions taken in this case, resulting in thousands of pages
6 of testimony. DaVita has condensed the specific testimony it seeks to exclude, in limine, into a
7 single document to simplify the process of analyzing the objectionable testimony. *See*
8 Declaration of Patricia K. Buchanan in Support of Defendant DaVita's Motions in Limine to
9 Exclude Specific Testimony and Exhibits,¹ Ex. 1. A table of contents is provided at the
10 beginning of this separate document for ease in identifying and locating the objectionable
11 testimony. DaVita moves to exclude the testimony provided for the reasons specified in the
12 summary, incorporated herein by reference. Specific excerpts are also discussed further below.

13 **C. A witness should not be permitted to testify unless the witness has personal knowledge of the subject matter.**

14 Federal Rule of Evidence 602 states, "A witness may not testify to a matter unless
15 evidence is introduced sufficient to support a finding that the witness has personal knowledge
16 of the matter." A witness without personal knowledge on a certain topic cannot properly
17 answer questions regarding that topic. Fed. R. Evid. 602. "A person has 'personal knowledge'
18 of 'a fact which can be perceived by the senses' only if he 'had an opportunity to observe, and
19 [has] actually observed the fact.'" *United States v. Owens*, 789 F.2d 750, 754 (9th Cir. 1986)
20 *rev'd on other grounds*, 484 U.S. 554, 98 L. Ed. 2d 951, 108 S. Ct. 838 (1988) (citing Advisory
21 Committee Note to Rule 602).

22 During several depositions, it became clear that the deponent lacked personal
23 knowledge on the subject. Where a deponent lacks personal knowledge but nonetheless
24

25 ¹ The Declaration of Patricia K. Buchanan in Support of Defendant DaVita's Motions in Limine to Exclude Specific Testimony and Exhibits will hereinafter be referenced as "Declaration of Patricia K. Buchanan."

1 answers the question, such answer is mere speculation and is inadmissible and unfairly
2 prejudicial under Rule 403. Specific statements that are not based on personal knowledge have
3 been excerpted from the deposition transcripts and submitted as Exhibit 1 to the Declaration of
4 Patricia K. Buchanan (§ I parts B, C, G, I, and K; § III part A; § IV parts C-H). DaVita moves
5 to exclude these statements.

6 **D. Hearsay statements should be excluded.**

7 “[A] statement, other than one made by the declarant while testifying at the trial or
8 hearing, offered in evidence to prove the truth of the matter asserted” is hearsay. Fed. R. Evid.
9 801(c). Subject to specific exceptions, hearsay is inadmissible at trial. Fed. R. Evid. 802.

10 **1. Alleged statements that Ms. Gambini would be returning to work**
11 **should be stricken as hearsay.**

12 DaVita has previously argued, in its motions to strike, that the following statements
13 (written and spoken) by Carrie Bratlie should be excluded as inadmissible hearsay: (1) Ms.
14 Gambini could take all the time she needed on leave; (2) Ms. Gambini was on leave; and (3)
15 Ms. Gambini would be returning to work. For instance, in Exhibit 43, Ms. Gambini offers a
16 “Personnel Change Notice” signed by Ms. Bratlie that contains statements regarding Ms.
17 Gambini’s request for leave. Decl. of Patricia K. Buchanan, Ex. 2.² In addition, she offers
18 Exhibit 47, a statement by a DaVita teammate that “it was conveyed . . . that [Ms. Gambini]
19 will in fact be returning after she is properly medicated.” *Id.* Further, Ms. Gambini is expected
20 to testify that Ms. Bratlie told her to take all the time she needed on leave. These statements
21 are offered to prove the truth of the statement, that is, they are offered to prove that Ms. Bratlie
22 had placed Ms. Gambini on leave. This use is prohibited by the hearsay rule.

23 In its ruling on DaVita’s motions to strike, the Court determined that “the admissions of
24

25 ² Those of plaintiff’s exhibits DaVita moves to exclude in whole or in part are attached to the Declaration of
Patricia K. Buchanan as Exhibit 2. Each exhibit has “Plaintiff’s Exhibit ____” on the first page.

1 DaVita's speaking agents are not hearsay under Fed. R. Evid. 801(d)(2)." Dkt. 63 at 21.
2 However, that rule requires that the speaker be authorized to make the statement concerning the
3 subject or be acting within the scope of her employment while making the statement. Fed. R.
4 Evid. 801(d)(2)(C), (D). The Washington Supreme Court considers speaking agents to be
5 "[t]hose who are ultimately responsible for managing the entity's operations have the strongest
6 interest in the outcome of any dispute involving the entity. . . . These officials are the multi-
7 person entity's alter ego -- they can speak and act for the entity and can settle controversies on
8 its behalf." *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 202, 691 P.2d 564 (1984). This
9 description does not apply to Carrie Bratlie. She was not, and is not, a speaking agent for
10 DaVita. She supervised six employees in an office of over 600 employees, in a nationwide
11 corporation that has thousands of employees. She had no authority to grant leave, which
12 requires a formal request and approval by human resources. Ms. Bratlie's statements regarding
13 leave should be excluded.

14 **2. Specific excerpted statements should be excluded as hearsay.**

15 In addition to the statements discussed above, specific out-of-court statements that are
16 offered to prove the truth of the matter asserted have been excerpted from the deposition
17 transcripts and submitted as Exhibit 1 to the Declaration of Patricia K. Buchanan (§ I parts C,
18 F, H, I, K; § IV parts A-H). As an employee of DaVita, Patricia O'Bannon was one of Ms.
19 Gambini's peers, and was not a speaking agent whose testimony would come within the scope
20 of Rule 801(d)(2)(C) or (D).

21 **E. Unauthenticated handwritten entries should be redacted from exhibits.**

22 **1. The unauthenticated handwritten entry in Plaintiff's Exhibit 21**
23 **should be redacted if the exhibit is admitted for trial.**

24 Evidence must be authenticated before it is admissible. Fed. R. Evid. 901(a). A
25 proponent must set forth "evidence sufficient to support a finding that the matter in question is

1 what its proponent claims.” *Id.* In Exhibit 21, a typed document prepared by Carrie Bratlie,
2 some handwritten words appear in the corner. Decl. of Patricia K. Buchanan, Ex. 2. Ms.
3 Bratlie, however, does not know who added to the document:
4

5 Q The handwriting in the bottom left-hand corner of the document, do you
6 recognize it?

7 A No, I don't.

8 Q Can you read it?

9 A “We forgot her birthday.”
10

11 Q That's not your handwriting?

12 A No.

13 Q Do you know who might have written that?

14 MS. BUCHANAN: If you can answer without guessing, go ahead.

15 A No. I don't know who that is.

16 Decl. of Patricia K. Buchanan, Ex. 3 at 92:16-93:3. The record contains no other evidence of
17 who wrote the entry. Therefore, the handwritten portion should be redacted.

18 **2. Handwriting on Exhibit 16 has not been authenticated in discovery.**

19 Similarly, on Exhibit 16, a notification of profit sharing contribution, some handwritten
20 notes were added. These notes should be redacted, as the writer has not been identified.

21 **F. Expert opinions proffered by lay witnesses should be excluded.**

22 Under Fed. R. Evid. 701, a lay witness is only permitted to offer opinions if they are not
23 based in scientific, technical, or other specialized knowledge.

24 **1. Ms. Gambini should not be permitted to testify about medical
25 opinions that require an expert knowledge base.**

Ms. Gambini penned, with her boyfriend's help, a self-serving letter in response to her

1 employment being terminated that she offers as trial Exhibit 54. Decl. of Patricia K. Buchanan,
2 Ex. 2. In it, she recites what is purported to be a medical explanation of her condition. She has
3 not been qualified as an expert. She has no expertise to offer a medical opinion. Therefore, as
4 scientific, technical, or other specialized knowledge is necessary, the following portion of
5 Exhibit 54 should be redacted:

6
7 Similar to medications used for depression, bipolar medications can take
8 anywhere from two to six weeks to reach therapeutic levels. Unlike depression,
9 bipolar disorder involves multiple neurotransmitters which control mood and
10 can take years to find the correct combination and dosage of medication to treat
11 both the manic and depressive cycles effectively. In my case, as in most, the
12 beginning of treatment focuses on therapeutic medications to control depressive
13 cycles and then treatment to stabilize manic episodes follows.

14 Ex. 54 at 1. Ms. Gambini should also not be permitted to testify to such matters, as it would
15 confuse the jury.

16
17 **2. Ms. O'Bannon should not be permitted to testify about medical
18 opinions that require an expert knowledge base.**

19 Certain testimony by Ms. O'Bannon about bipolar disorder also constitutes expert
20 opinion by a lay witness and should be excluded. This includes the testimony excerpted and
21 attached to the Declaration of Patricia K. Buchanan in support of this motion in § I, parts C, E,
22 and L.

23
24 **3. Todd DeMille should not be permitted to testify regarding legal
25 issues.**

26 Todd DeMille testified in deposition that he is a trained human resources professional
27 and has taken some courses in employment law. Decl. of Patricia K. Buchanan, Ex. 4 at 7:12-
28 22, 13:10-22. He should not be permitted to give legal opinions regarding the facts and
29 circumstances of this case.

30
31 **G. Certain evidence may not be considered in determining whether Ms.
32 Gambini is entitled to an award of damages under the FMLA.**

33
34 **1. Plaintiff's trial Exhibits 69-73 cannot be used to prove FMLA**

1 **damages.**

2 Ms. Gambini proffers several exhibits that purportedly show her out-of-pocket expenses
3 for prescriptions and health care. Decl. of Patricia K. Buchanan, Ex. 2. Out-of-pocket
4 expenses are in the nature of consequential damages, and § 2617(a)(1) does not provide for
5 recovery of general or consequential damages. Thus, § 2617(a)(1)(A)(i)(I) does not support an
6 award of damages for plaintiff's out-of-pocket expenses. *Nero v. Industrial Molding Corp.*,
7 167 F.3d 921, 930 (5th Cir. 1999). Ms. Gambini's exhibits cannot be used in calculating
8 FMLA damages, if any.

9 **2. Emotional distress damages are not available under the FMLA.**

10 Ms. Gambini is expected to testify and present evidence as to her alleged emotional
11 distress. However, the FMLA does not provide damages for emotional distress. *McAnnally v.*
12 *Wyn South Molded Products*, 912 F. Supp. 512 (N.D. Ala. 1996) (employee was not entitled to
13 mental distress damages because the FMLA only provided for recovery of lost wages, salary,
14 employment benefits, and other compensation and mental distress was not "other
15 compensation" because they do not involve a quid pro quo exchange between an employer and
16 its employee); *Settle v. S.W. Rodgers Co.*, 998 F. Supp. 657 (E.D. Va. 1998); *Lloyd v. Wyoming*
17 *Valley Health Care System*, 994 F. Supp. 288, 291 (M.D. Pa. 1998). *See also Nero v. Industrial*
18 *Molding Corp.*, 167 F.3d 921, 930 (5th Cir. 1999) (the term "other compensation," appearing as
19 it does with the other terms, implies a quid pro quo exchange for services rendered).
20 *Washington v. Fort James Operating Co.*, 110 F. Supp. 2d 1325, 1334 (D. Or. 2000). No
21 evidence of emotional distress may support an award under the FMLA.

22 **3. Ms. Gambini may not recover "front pay."**

23 Ms. Gambini wanted to change jobs before DaVita terminated her employment in July
24 2002. She told her boyfriend she wanted to quit working at DaVita, but he advised her that she
25 could not collect unemployment if she quit unless there was cause. Decl. of Patricia K.

1 Buchanan, Ex. 4 at 16:20-17:1. She told her mental health provider that she needed to look for
2 another job. Decl. of Patricia K. Buchanan, Ex. 5 at 58:7-15. Her mental health provider
3 encouraged her to consider ways to deal with the stress she felt at work, and Ms. Gambini
4 responded that she must change jobs:

5 Q: Then [your July 3, 2002 chart note] goes on to say, "Looking for another
6 job."

7 A: Uh-huh.

8 Q: What do you recall about that?

9 A: I just know she was having a lot of stress at work, and she was looking -
10 "Must change jobs. Just realizing this is very stressful." And I think that goes
11 to that whole process of me looking at what is the stress, what are you going to
12 do about it, you know, how are you going to make this better? It's making your
13 illness worse. What are you going to do to problem solve these stressors that are
14 making your illness worse? And, you know, looking for another job, looking for
15 a way to get out of the work stress, those are the issues to me, not the details of
16 what's going on.

17 Decl. of Patricia K. Buchanan, Ex. 5 at 57:10-22. *See also* Decl. of Patricia K. Buchanan, Ex. 2
18 (Plaintiff's Ex. 67, chart note for July 3, 2002).

19 In addition, Ms. Gambini was planning to return to school before she left DaVita. Decl.
20 of Patricia K. Buchanan, Ex. 2 (Plaintiff's Ex. 29). After she left DaVita, Ms. Gambini decided
21 to return to school instead of returning to the workforce. She became a full-time student at
22 Cornish College of the Arts in September 2003.

23 Finally, Ms. Gambini testified that simply going near Tacoma makes her anxious.

24 Q: Any other way you have been impacted by the events at DaVita?

25 A: It's hard for me to come to Tacoma. When I have to come to Tacoma, I take
kind of the long way around to my destination. If I drive past DaVita, I'm very
anxious. I get concerned that somebody may see me.

Decl. of Patricia K. Buchanan, Ex. 6 at 176:13-19. However, she still claims that she should be
reinstated to her former position or a substantially similar one. Amended Complaint, Dkt. No.

1 6 at 9.

2 It is manifest that Ms. Gambini wanted and intended to leave DaVita prior to her
3 termination. As the court held in *Miller v. AT&T*, 83 F. Supp. 2d 700, 708-09 (S.D. W.Va.
4 2000), a plaintiff "is certainly entitled to a change of career. However, her new career and
5 lifestyle choice should not be subsidized by [her employer]. A successful FMLA plaintiff
6 cannot simply reevaluate her career goals, accept a lesser paying job, and receive the same
7 amount of compensation as before through front pay." *Miller*, 83 F. Supp. 2d at 708-09. Here,
8 Ms. Gambini has chosen to pursue a career in art. To the extent Ms. Gambini seeks front pay
9 in lieu of reinstatement, DaVita is simply not obligated to subsidize Ms. Gambini's new career
10 goals. Evidence or argument that Ms. Gambini is entitled to front pay should be excluded.

11 Moreover, it is likewise apparent that DaVita's decision to terminate Ms. Gambini's
12 employment had nothing to do with her purported intention to request leave under the FMLA.
13 Thus, there is no proximate cause between her firing and her assertion of rights under the
14 FMLA. Under these circumstances, Ms. Gambini should be precluded from asserting that she
15 is entitled to reinstatement because DaVita would have fired her regardless of whether she
16 requested leave or otherwise asserted rights under the FMLA. Indeed, that is precisely what
17 happened. Any such evidence or testimony regarding reinstatement should be excluded.

18 **H. Irrelevant evidence should be excluded.**

19 Evidence is relevant if it tends to make any material fact more or less probable. Fed. R.
20 Evid. 401. Evidence that is not relevant is not admissible. Fed. R. Evid. 402.

21 **1. Testimony about the anti-harassment proceedings and Plaintiff's**
22 **Exhibits 55-65 should be excluded.**

23 Ms. Gambini appealed the anti-harassment order entered against her by the Pierce
24 County District Court. Her claim for abuse of process based on the anti-harassment petition
25 was dismissed on summary judgment. Dkt. 63. All of the documents filed in the anti-

1 harassment proceedings (Exhibits 55-65) are irrelevant. Decl. of Patricia K. Buchanan, Ex. 2.
2 Further, her testimony regarding the proceedings is irrelevant. That testimony should also be
3 excluded as irrelevant.
4

5 **2. Testimony that one of Ms. Gambini's coworkers who has bipolar**
6 **illness was not terminated despite her actions should be excluded.**

7 In support of her disparate treatment claim, Ms. Gambini is expected to introduce
8 evidence that a coworker with bipolar disorder was not terminated when she swore in the
9 workplace. However, such evidence is irrelevant to the inquiry. The disparate treatment cause
10 of action is based on the idea that an employer may not treat a disabled person differently than
11 a non-disabled person. *McClarty v. Totem Elec.*, 119 Wn. App. 453, 470, 81 P.3d 901 (2003).
12 Testimony regarding the alleged behavior of Ms. Gambini's disabled coworker is irrelevant and
13 should be excluded. This includes the subjects in the excerpted testimony of Ms. Gambini and
14 witnesses O'Bannon and Bratlie, included in Exhibit 1 to the Declaration of Patricia K.
15 Buchanan (§ I, parts G and J; § II, part A; § V, part A).

16 **3. Specific irrelevant testimony should be excluded.**

17 Certain other irrelevant testimony has been excerpted and attached to the Declaration of
18 Patricia K. Buchanan in support of this motion (§ I, parts A-G, J, and K).

19 **I. Plaintiff's trial exhibit 64 should be excluded.**

20 In trial Exhibit 64, Ms. Gambini seeks to admit the written order of the Pierce County
21 Superior Court vacating the anti-harassment petition. As argued above, this document is no
22 longer relevant, as Ms. Gambini's abuse of process claim was dismissed. Further, admitting
23 the written order will unfairly prejudice DaVita. If the alleged probative value of proffered
24 evidence is substantially outweighed by the danger of unfair prejudice, the evidence should be
25 excluded. Fed. R. Evid. 403. An official-looking court document, signed by a judge, will carry
undue weight with a jury. If the order vacating the anti-harassment order is presented to the

1 jury, members of the jury may conclude incorrectly that the order necessitates a finding in Ms.
2 Gambini's favor in this case. Moreover, the judge who vacated the ruling, Judge Karen
3 Strombom, is now a magistrate judge in this very division of the Western District of
4 Washington. The members of the jury may conclude that the state proceeding is somehow tied
5 to this proceeding. The danger of unfair prejudice is too great to admit the appellate order.

6
7 **J. Plaintiff's trial Exhibit 65 or portions thereof not incorporated into the
written order should be excluded.**

8 Ms. Gambini also seeks to admit the transcript of appellate oral argument in the anti-
9 harassment order proceedings as a trial exhibit. It should be excluded for the following
10 reasons.

11 **1. A court's oral rulings not incorporated into the written order are
12 not binding.**

13 A written order supercedes any oral rulings. A court's written decision is considered
14 that court's "'ultimate understanding' of the issue presented." *State v. Dailey*, 93 Wn.2d 454,
15 459, 610 P.2d 357 (1980) (citing *Diel v. Beekman*, 7 Wn. App. 139, 499 P.2d 37 (1972) and
16 *Thompson v. Thompson*, 9 Wn. App. 930, 934, 515 P.2d 1004 (1973)) (basis for dismissal in
17 oral ruling disregarded in favor of basis in written order). *See also Anderson v. Farmers Ins.*
18 *Co.*, 83 Wn. App. 725, 923 P.2d 713 (1996) (oral ruling did not prevent timely submittal of
19 supplemental argument before written order). An oral decision has no binding or final effect if
20 it is not formally incorporated into the written order. *Id.* at 458-59 (citing *Ferree v. Doric Co.*,
21 62 Wn.2d 561, 567, 383 P.2d 900 (1963); *Clifford v. State*, 20 Wn.2d 527, 148 P.2d 302 (1944)
22 and *Seidler v. Hansen*, 14 Wn. App. 915, 547 P.2d 917 (1976)). Verbal statements by a judge
23 are only considered an expression of an informal opinion that is "'necessarily subject to further
24 study and consideration, and may be altered, modified, or completely abandoned.'" *Id.* at 458
25 (quoting *Ferree*, 62 Wn.2d at 567).

1 In the appeal, the court ruled in Ms. Gambini's favor. On page 20 of the transcript, the
2 court stated that all evidence presented by DaVita was inadmissible; therefore, the anti-
3 harassment order was vacated. The court stated, "I don't think I need to go beyond this," then
4 analyzed other of Ms. Gambini's arguments for vacating the order. The judge then signed the
5 order, which had been drafted and presented by plaintiff's counsel and was edited by counsel
6 for both parties. This written order **only** states that substantial evidence was not presented to
7 support the anti-harassment petition. Plaintiff's Exhibit 64.

8 The transcript excerpt from pages 20:12 to 21:3 (inclusive) should not be presented to
9 the jury. The court's oral musings regarding other bases for vacating the petition are merely a
10 verbal expression of the court's informal opinion at the time. The court could have included, or
11 even incorporated, these bases in the written order, but did not. Therefore, the oral statements
12 have no binding or final effect in either that case, or this one. The excerpt should therefore be
13 excluded in limine.

14 **2. A transcript in another case is not relevant to this proceeding.**

15 Further, the entire transcript should be excluded as irrelevant. Now that Ms. Gambini's
16 abuse of process claim has been dismissed, the transcript has **no tendency** to make the
17 existence of any fact that is of consequence to the determination of the remaining claims more
18 probable than it would be without the evidence. As such, it does not meet the definition of
19 "relevant evidence" set out in Fed. R. Evid. 401. Evidence that does not meet the definition is
20 not admissible. Fed. R. Evid. 402. The transcript, Plaintiff's Exhibit 65, should be excluded in
21 its entirety.

22 **3. The transcript would be unfairly prejudicial to DaVita.**

23 Even if this Court finds that the transcript is relevant, DaVita would be unfairly
24 prejudiced if this Court admits the transcript. For the same reasons put forth that admitting
25

1 Judge Stromborn's order would be unfairly prejudicial, the danger of unfair prejudice in
2 admitting the transcript is too great.

3 **K. The Court should exclude any references to Ms. Gambini's alleged**
4 **litigation-induced stress.**

5 Ms. Gambini is expected to testify that she has suffered emotional distress and/or stress
6 as a result of litigating her claims against DaVita. Further, she is expected to offer testimony of
7 her mental health practitioner, Bobbie Fletcher to that effect. This Court should exclude any
8 and all references to Ms. Gambini's alleged litigation-induced stress.

9 "[F]ederal court decisions are unanimous in holding that litigation-induced stress may
10 not be recovered as damages." *Picogna v. Bd. of Ed.*, 143 N.J. 391, 671 A.2d 1035, 1038 (N.J.
11 1996); *see, e.g., Flowers v. First Hawaiian Bank*, 295 F. Supp. 2d 1130, 1140 (D. Haw. 2003);
12 *Stoleson v. United States*, 708 F.2d 1217, 1223 (7th Cir. 1983); *Timms v. Rosenblum*, 713
13 F.Supp. 948, 955 (E.D. Va. 1989), *aff'd* 900 F.2d 256 (4th Cir. 1990). Likewise, state courts
14 "are virtually unanimous in holding that litigation-induced stress is not recoverable as a
15 separate component of damages." *Picogna*, 671 A.2d at 1038; *see, e.g., Buoy v. ERA*
16 *Helicopters, Inc.*, 771 P.2d 439, 445 (Alaska 1989); *MacCharles v. Bilson*, 186 Cal. App. 3d
17 954, 231 Cal. Rptr. 155, 157 (Ct. App. 1986).

18 Both the state and federal cases reflect the view that because anxiety is an
19 unavoidable consequence of the litigation process, it does not form a separate
20 basis for recovery against one's opponent. Although the damages caused by the
21 wrongful conduct induce the litigation, and hence the attendant stress, a plaintiff
22 chooses to pursue litigation cognizant of both the economic and emotional costs
that it will entail. Some of the stress is caused by a general distaste for
litigation, and some by a plaintiff's vigorous participation in the litigation
process. Yet the substantial emotional investment made by a plaintiff in a case
is merely the normal result of being a litigant.

23 *Picogna*, 143 A.2d at 1038-39.

24 Ms. Fletcher testified in deposition:

25 My note says more depressed, symptom list more depressed, and it says, "with

1 current situation," so that's applying -- assuming there's something going on in
2 her life. Depositions are very upsetting, so she does mention that she's been
3 deposed and that that's been upsetting for her. Part three of her deposition is
4 coming up, which is anxiety. "They keep pounding at me that I'm faking, and I
5 feel" -- I can't read it. Missed a lot of school during this period. Is making C's.
6 She normally makes A's

Decl. of Patricia K. Buchanan, Ex. 5 at 31:9-20. Further, she testified:

7 A Also I've written in the margin over here, "Feels betrayed," and I think that
8 was her response to the depositions to people that were being deposed in her
9 case.

Q Okay. So would you take it, based on that chart note of May 20, 2004, that a
lot of her anxiety was due to the actual litigation process?

MS. PHELAN: Object to the form of the question, but go ahead and answer.

A I would have to say yes.

Id. at 32:9-17. Because permitting recovery for litigation-induced stress would punish DaVita
for defending this lawsuit brought by Ms. Gambini, this Court should exclude all references to
such stress.

**L. The Court should exclude every finding, determination, conclusion,
declaration, or final order made by the Washington Employment Security
Department.**

Following Ms. Gambini's termination, she applied for unemployment benefits. She was
ultimately awarded unemployment. Nothing generated by the Employment Security
Department ("ESD") in connection to this application is admissible:

**"Any finding, determination, conclusion, declaration, or final order made by
the commissioner, or his or her representative or delegate, or by an appeal
tribunal, administrative law judge, reviewing officer, or other agent of the
department for the purposes of Title 50 RCW, shall not be conclusive, nor
binding, nor admissible as evidence in any separate action outside the scope of
Title 50 RCW between an individual and the individual's present or prior
employer before an arbitrator, court, or judge of this state or the United States,
regardless of whether the prior action was between the same or related parties or
involved the same facts or was reviewed pursuant to RCW 50.32.120."**

RCW 50.32.097 (emphasis added). Under this rule, the following ESD documents are
inadmissible:

1 September 13, 2002 determination (e.g. ESD file at 45-48)

2 September 13, 2002 determination (e.g. ESD file at 49-51)

3 October 23, 2002 Notice of Hearing by Telephone (ESD file at 79-80)

4 November 5, 2002 Order of Dismissal Appeal Withdrawn (e.g. ESD file at 68-69)

5 September 12, 2003 determination (e.g. ESD file at 122-26)

6 November 4, 2003 TEUC Airline Extension determination

7 Ms. Gambini has not designated any of these as trial exhibits, but if she seeks to admit them for
8 other purposes, DaVita requests that the Court exclude these documents and information
9 contained therein.

10 **M. There should be no reference to settlement offers, demands, negotiations or**
11 **discussions.**

12 Federal Rule of Evidence 408 specifically prohibits any mention of settlement offers or
13 proposals in order to prove the validity or invalidity of a claim. In *McInnis v. A.M.F., Inc.*, 765
14 F.2d 240 (1st Cir. 1985), the Court of Appeals for the First Circuit held that admission of
15 evidence of settlement with a third party was not harmless error and ordered a new trial. See
16 also *McHann v. Firestone Tire and Rubber Co.*, 713 F.2d 161 (5th Cir. 1983). In this case, the
17 parties attempted alternative dispute resolution through a mediator on October 29, 2004, and in
18 private negotiations. However, the case was not resolved. All references to these attempts
19 must be excluded.

20 **N. There should be no display of exhibits until the exhibit is admitted by the**
21 **court into evidence, or until permission has been obtained from the Court.**

22 This motion involves a matter of fundamental fairness. If an exhibit is used in opening
23 statement or closing argument and such exhibit is not admissible evidence or not a fair
24 summary of admissible evidence, the opposing party is unfairly prejudiced. Therefore, any
25 exhibits that have not been admitted before or during trial should not be used in arguments.

1 **O. The testimony of any expert or lay witness or their testimony not previously**
2 **identified by the parties should be excluded.**

3 Evidence should be excluded if there is a showing of intentional or tactical non-
4 disclosure. *See* Fed. R. Evid. 403; Fed. R. Civ. Procedure 37(b) and (c). Rule 37(c)(1)
5 provides (in part) that “a party that without substantial justification fails to disclose information
6 required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by
7 Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, or
8 on a motion any witness or information not so disclosed.” In *Semper v. Santos*, 845 F.2d 1233,
9 1237 (3d Cir. 1988), the court upheld an order to exclude an expert who was not disclosed until
10 the day after jury selection. The trial court’s exclusion of testimony because of the failure of
11 counsel to adhere to a pretrial order will not be disturbed on appeal absent a clear abuse of
12 discretion. *Id.* In determining whether to exclude testimony the court should consider the
13 following factors: (1) the prejudice or surprise in fact of the party against whom the excluded
14 witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent
15 to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and
16 efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing
17 to comply with the district court’s order. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d
18 Cir., 1994) (citing *Meyers v. Pennypack Woods Home Ownership Ass’n*, 559 F.2d 894 (3d Cir.
19 1977) (*over-ruled on other grounds*)). The court also has the power to impose sanctions. Fed.
20 R. Civ. P. 37(c)(1). It would be unduly prejudicial to DaVita if Ms. Gambini were allowed to
21 introduce evidence and witnesses who have not been previously disclosed. Such evidence
22 constitutes unfair surprise and is prohibited by Rule 403.

23 **P. All non-party witnesses should be excluded from the courtroom during the**
24 **course of trial.**

25 Upon the request of a party, this Court shall order all non-party witnesses to be
excluded from the courtroom while they are not testifying. Fed. R. Evid. 615. DaVita requests

1 that the Court exclude all non-party witnesses from the courtroom.

2 **Q. There should be no reference to liability or medical insurance held, or not**
3 **held, by any party.**

4 Evidence of a defendant's liability insurance is not admissible on the issue of
5 defendant's negligence. Fed. R. Evid. 411. In *Reed v. General Motors Corp.*, 773 F.2d 660
6 (5th Cir. 1985) the court held that admission of the parties' liability limits was reversible error
7 and ordered a new trial. The Court should exclude any evidence of insurance coverage or the
8 extent thereof in this case.

9 **R. There should be no mention that this motion has been filed and argued**
10 **before the Court.**

11 It is respectfully requested that this Court exclude all mention that defendant has
12 brought these motions in limine prior to the beginning of trial. Plaintiff's counsel should be
13 reminded that if any prejudicial comments, arguments or evidence are made before the jury, the
14 Court will instruct the jury to disregard the same and consider these motions in limine as a
15 continuing motion for a mistrial.

16 //

17 //

18 //

19 //

20 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

III. CONCLUSION

For the reasons set forth above, DaVita respectfully requests that this Court exclude the above evidence in limine to avoid the prejudice that could result if the admissibility needs to be argued before the jury.

DATED this 15th day of November, 2004.

LEE, SMART, COOK, MARTIN
& PATTERSON, P.S., INC.

By: s/ Patricia K. Buchanan
Patricia K. Buchanan, WSBA No. 19892
Pamela J. DeVet, WSBA No. 32882
Lee, Smart, Cook, Martin & Patterson, P.S., Inc.
701 Pike Street, Suite 1800
Seattle, WA 98101
Telephone: (206) 624-7990
Fax: (206) 624-5944
E-mail: pkb@leesmart.com
Of Attorneys for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on November 15, 2004 I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following parties: Michael C. Subit and Sean M. Phelan of Frank Freed Subit & Thomas LLP.

s/ Susan H. Madsen
Susan H. Madsen